

Flexible Solidarity – Effective Solidarity?

MARKUS KOTZUR — 16 November, 2016



While the Member States of the European Union are still divided about both their migration policies and politics, in particular about taking in (which number and which kind of) refugees, the so-called Visegrad Group or “V4 Countries” (Poland, Slovakia, the Czech Republic and Hungary) has/have proposed “flexible solidarity” as a new tool to handle the crisis and feasible alternative to resettlement and mandatory quotas. “Flexible solidarity”, they argue, “should enable Member States to decide on specific forms of contribution taking into account their experience and potential. Furthermore, any distribution mechanism should be voluntary.” Their clear intention is to find a pragmatic compromise in the hard-fought disputes with Germany and other Western Member States. In a “Joint Statement“

presented at the Bratislava Summit (16 September 2016) the V4 stress that for the Brexit-shocked Union “the outcome of the British referendum, though undesired, opens an opportunity to improve the functioning of the EU (...).” Doubtlessly, significant improvements are necessary – as the V4 continue to argue – in order to “restore common trust in the European project (...).” Among many other shared values, common trust, for sure, requires (more than a) minimum degree of solidarity. One wonders whether or not solidarity’s new “flexible” version might be more than a buzzword to gloss over the lack of substance.

1. Questions Arise

For any further evaluation, it is necessary to have a look at the definition given by the V4: “Migration policy should be based on the principle of the ‘flexible solidarity’. This concept should enable Member States to decide on specific forms of contribution taking into account their experience and potential. Furthermore any distribution mechanism should be voluntary.” Do flexibility and solidarity go hand in hand as form of experience-based burden sharing on a voluntary basis? The answer is neither a clear “Yes” nor a clear “No” neither. Albeit numerous references to solidarity are enshrined in the Union’s primary law (e.g. Art. 2 TEU, Art. 3 III and V TEU, or Art. 222 TFEU), a precise legal definition is missing. This lack of conceptual clarity makes it all the more difficult to concretely apply the rather vague and abstract notion of “solidarity” to the migration and refugee law context. Before trying to do that, thus some decisive preliminary questions arise: Which overall expectations, moral obligations, political assumptions and – if at all – normative force can be attributed to what the Union Treaties in general phrase as “solidarity”?

2. Conceptualizations Matter

Conceived as mode of organizing a polity and, where such a polity transcends the nation state, as a mode of fostering transnational cooperation, solidarity reaches far beyond certain moral obligations the individual might have towards the other members of her or his polity (in private life, e.g., the family, in public life, e.g., the needy and left-behind ones by society). Constitutional law and theory have established some tradition to conceptualize solidarity as program and/or principle: for example in form of social rights, social security instruments, or revenue allocation schemes in federal states. Substantiations of this kind paved the way for shifting the solidarity paradigm from the domestic to the European plane. Art. 2 TEU, Art. 3 III and Art. 3 V TEU, though not expressly, but intrinsically hold solidarity to be a prerequisite for and an aim of integration. The Union, as said in Art. 3 III TEU is based upon “solidarity among Member States” and aims at achieving “solidarity among Member States” in an “ever closer” form (see Art. 1 II TEU). Solidarity operates as a principle to achieve common goals; sometimes it imposes common, sometimes it imposes differentiated obligations or responsibilities: it encompasses procedural and operational, substantive and normative elements, values and legal obligations (respectively entitlements) as famously outlined by R. Wolfrum (Solidarity amongst States: An Emerging Structural Principle of Public International Law, in: P.-M. Dupuy (ed.), *Völkerrecht als Weltordnung. Festschrift für Christian Tomuschat*, 2006, pp. 1087).

3. And so Does the Precise Normative Framework

Art. 2 TEU (to give only some further examples and more detailed explanations in the following) addresses the Union's basic values and declares that these values derive from a society upholding, among others, the principle of solidarity. Besides plain economic interdependence, a political community needs a more demanding "bonum commune"-orientation: a *common European* "bonum commune" that is to say a common European "public wealth" based on shared public interests. Art. 3 TEU ranks the "bonum commune"-relevant solidarity among the Union's aims and purposes promoting co-operative solidarity among the Member States (para 3) and in the global realm (para 5). Not surprisingly, solidarity and loyalty are of (and stem from) the same spirit as Art. 24 (3) TEU refers to a "spirit of loyalty and mutual solidarity". Economic integration requires solidarity when grave difficulties arise (Art. 122 TFEU and 143 TFEU). Most obviously, to fight terrorist attacks and to provide help in cases of natural or man-made disasters requires "solidarity". This is literally made explicit by Title VII, Art. 222 (using the phrase "Solidarity Clause" as headline). As on the national plane, solidarity has found many substantiations in the European realm. Most importantly, solidarity is concretized in a human rights context which brings us also back to a human rights based refugee, asylum and migration law.

4. In Particular: Human Rights Matter

Solidarity has a human rights basis (social rights, right to minimum living conditions etc.). In that regard, the European Union can learn from the international community. UN-

General Assembly Resolution 59/193 on the “Promotion of a democratic and equitable international order” states under number 4 lit. f: “Solidarity, as a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most.” The reference to a fair distribution of costs and burdens is quite the same argument which the V4 in their definition of “flexible solidarity”. However, the “responsibility to protect”, another international concept, may not be disregarded either. Far beyond the famous 1951 Refugee Convention, the protection of refugees has a human rights basis. To be very brief and leaving aside further reference and dogmatic considerations: This human rights basis is shown by manifold right to asylum-guarantees (direct ones such as Art. 16 a German Basic Law or indirect ones such as the duty to protect human life or the non-refoulement principle) in the constitutions of the Member States. It is moreover shown by the European Convention of Human Rights and the jurisprudence of the Strasbourg Court (e.g. as to the non-refoulement principle again) and finds also expression in the EU-Human Rights Charter. “Flexible solidarity” is an adequate mean if it supports the irrevocable human rights basis. “Flexible solidarity” turns into alarming lip-service if trying to undermine this irreversible human rights basis. Flexible solidarity can never justify an opt-out from human dignity-based human rights obligation. It can only work as an “opt in” to accept shared responsibilities in joined burden sharing. The Member States can volunteer on the “how” of burden-sharing. They cannot volunteer on accepting binding human rights standards. That has to be the *leitmotif* for any further discussions on all variations of solidarity whatsoever.

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